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IN THE

Supreme Court of the United States

OCTOBER TERM 1949.

No. 27.

SECRETARY OF AGRICULTURE, *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY, *Respondents*; PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Intervenor*; THE AMERICAN SUGAR REFINING COMPANY, ET AL., *Intervenors*; and THE GOVERNMENT OF PUERTO RICO, *Intervenor*.

No. 30.

PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR PORTO RICAN AMERICAN SUGAR REFINERY, INC.

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INDEX.

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Specifications of Error	6
Summary of Argument	7
Argument	
A. The Primary Standard Which the Secretary of Agriculture Must Follow in Allotting a Quota is That It Be "Fair, Efficient and Equitable"	10
B. The Secretary Was Reasonable in Determining "Ability To Market" as He Did	14
C. The Secretary Was Reasonable in Determining "Past Marketings" as He did	24
D. The Secretary Was Reasonable in Finding That "Proportionate Shares" Was Inapplicable and in Giving It a Weighting of Zero	29
Conclusion	32

AUTHORITIES CITED

CASES:

Cardillo v. *Liberty Mutual Insurance Company*, 330 U. S. 469 (1947)	17
Gay Union Corporation v. *Wallace*, 112 F. 2d 192 (App. D. C. 1940), *cert. denied*, 310 U. S. 647 (1940)	25
Gray v. *Powell*, 314 U. S. 402 (1941)	15
Interstate Commerce Commission v. *City of Jersey City*, 322 U. S. 503 (1944)	31
Interstate Commerce Commission v. *Railway Labor Executives Ass'n.*, 315 U. S. 373 (1942)	11
Manufacturers Railway Company v. *United States*, 246 U. S. 457 (1918)	15
Mississippi Valley Barge Company v. *United States*, 292 U. S. 282 (1934)	15

Page

National Labor Relations Board v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944) 15
Opp Cotton Mills, Inc. v. *Administrator of the Wage and Hour Division of the Department of Labor*, 312 U. S. 126 (1941) 13
Parker v. *Motor Boat Sales*, 314 U. S. 244 (1941) ... 16
Pennsylvania Company v. *United States*, 236 U. S. 351 (1915) 15
Railroad Commission of Texas v. *Rowan & Nichols Oil Company*, 310 U. S. 573 (1940) 10
Rochester Telephone Corporation v. *United States*, 307 U. S. 125 (1939) 16
Securities & Exchange Commission v. *Central-Illinois Securities Corporation*, 69 Sup. Ct. 1377 (1949) 15
Securities & Exchange Commission v. *Chenery Corporation*, 332 U. S. 194 (1947) 11
South Chicago Coal & Dock Company v. *Bassett*, 309 U. S. 251 (1940) 16
Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297 (1937) 15
Unemployment Compensation Commission of Alaska v. *Aragon*, 329 U. S. 143 (1946) 16
United States v. *Lowden*, 308 U. S. 225 (1939) 11
United States v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533 (1939) 13

STATUTES:

Administrative Procedure Act (60 Stat. 237, 5 U. S. C. § 1001 *et seq.*) 4
Agricultural Marketing Agreement Act (50 Stat. 246, 7 U. S. C. § 601 *et seq.*) 13
Alaskan Unemployment Compensation Law 16
Bituminous Coal Act of 1937 (50 Stat. 72, 15 U. S. C. § 828 *et seq.*) 15
Communications Act of 1934 (48 Stat. 1064, 47 U. S. C. § 152(b)) 16
Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C. § 201 *et seq.*) 13
Judicial Code and Judiciary (28 U. S. C. § 1254) ... 2
Longshoremen's and Harbor Workers' Act (44 Stat. 1424, 33 U. S. C. § 901 *et seq.*) 16

Page

Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. § 79 *et seq.*) 11
Sugar Act of 1937 (50 Stat. 903) 19, 20, 25
Sugar Act of 1948 (61 Stat. 922, 7 U. S. C. Supp. II, § 1100 *et seq.*)

Section 205(a) 2, 3, 7, 10, 12, 13, 14
205(e) 2
207(b) 3
302(b) 11

MISCELLANEOUS:

Federal Register

12 F. R. 8225 3
13 F. R. 127 3
13 F. R. 310 ..... 1, 4

Hearings on Sugar Act of 1948, 80th Cong., 1st Sess. 12
House Report 796, 80th Cong., 1st Sess. 11

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OPINION BELOW.

The opinion of the court below (R. 194-97) is reported at 171 F. 2d 1016. Order 18, promulgated by the Secretary of Agriculture (R. 160-76), is reported at 13 F. R. 310-13.

JURISDICTION.

The judgment of the court below was entered on November 24, 1948 (R. 198). The petition for a writ of certiorari was filed by petitioner on February 21, 1949, and was granted on April 25, 1949 (R. 208). The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254 and Section 205(e) of the Sugar Act of 1948 (61 Stat. 927, 7 U. S. C. Supp. II, § 1115(e)).

QUESTIONS PRESENTED.

1. Whether the Secretary of Agriculture, in order to achieve a "fair, efficient, and equitable distribution" of the 1948 direct-consumption sugar allowance for Puerto Rico under Section 205(a) of the Sugar Act of 1948, had the authority to apply the factor "ability to market" by taking the best single year's performance by each refiner during the period 1935 through 1947.

2. Whether the Secretary of Agriculture, in order to achieve a "fair, efficient, and equitable distribution" of the 1948 direct-consumption sugar quota for Puerto Rico under Section 205(a) of the Sugar Act of 1948, had the authority to apply the factor "past marketings" by taking the average of the best five years for each refiner during the period 1935 through 1941.

3. Whether the Secretary of Agriculture, in order to achieve a "fair, efficient, and equitable distribution" of the 1948 direct-consumption sugar allowance for Puerto Rico under Section 205(a) of the Sugar Act of 1948, had the authority to determine that the factor of "proportionate shares" was inapplicable and should therefore be given a weighting of zero.

STATEMENT OF THE CASE.

Section 207(b) of the Sugar Act of 1948 (61 Stat. 922-33, 7 U. S. C. Supp. II, §§ 1100-60) provides that "Not more than one hundred and twenty-six thousand and thirty-three short tons, raw value, of the [sugar] quota for Puerto Rico for any calendar year may be filled by direct-consumption sugar"[1] (7 U. S. C. Supp. II, § 1117(b)). Section 205(a) provides further that "Allotments shall be made in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of such quota or proration thereof, by taking into consideration the processings of sugar or liquid sugar from .... sugarcane to which proportionate shares ... pertained; the past marketings or importations of each such person; and the ability of such person to market or import that portion of such quota or proration thereof allotted to him" (7 U. S. C. Supp. II, § 1115(a)). The Secretary of Agriculture determined that the capacity of Puerto Rican refineries to produce and market sugar in the continental United States exceeded the 126,033 statutory limitation and found an allotment to be necessary pursuant to Section 205(a) of the Act, to prevent disorderly marketing and importation of such sugar from Puerto Rico and to afford all interested persons an equitable opportunity to market such sugar in the continental United States.

In accordance with applicable rules of practice and procedure (7 C. F. R. 801.20 *et seq.*, as amended by General Sugar Regulations, Series 3, No. 1, 12 F. R. 8225, 13 F. R. 127, 131) and pursuant to proper notice thereof, a public hearing was held in Washington, D. C., for the stated purpose of receiving evidence to enable the Secretary to make a fair, efficient, and equitable distribution of that portion of the 1948 sugar quota for Puerto Rico to be filled by direct-consumption sugar for marketing in the continental

[1] Direct-consumption sugar is sugar which can be consumed without further refining or processing.

United States. The notice of the hearing contained a proposed allotment formula (R. 145-48).

Following a full and complete hearing (R. 2-144), the Secretary, on January 16, 1948, issued Order 18 (R. 160-76), and the same was filed January 21, 1948 (13 F. R. 310-13). Order 18 contains *inter alia* the basis and purpose of the allotment; the reasons for the order becoming effective when published in the Federal Register instead of complying with the thirty-day effective date requirement of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. §1001 *et seq.*); a summary of evidence adduced at the hearing; the statement of considerations of the Secretary; the findings of the Secretary; the conclusions of the Secretary; and the order providing for specific direct-consumption allotments to Puerto Rican refineries.

In arriving at the final quota figures in Order 18, the Secretary measured "past marketings" by giving each refiner credit for its average annual marketings during its best five years of the period 1935 through 1941 (R. 170, 172); he measured "ability to market" by the highest single year's marketings of each refiner during the period 1935 through 1947 (R. 170-71, 173); and after considering the factor of "proportionate shares" he found it inapplicable to the present situation and gave it a weighting of zero (R. 168-69, 171).

Subsequent to the issuance of Order 18, a Petition for Stay and Reconsideration of Order was filed for and on behalf of the Central Roig Refining Company and Western Sugar Refining Company (R. 176-78). On February 11, 1948, the Petition for Stay and Reconsideration of Order was denied (R. 178-79). Central Roig Refining Company and Western Sugar Refining Company appealed to the United States Court of Appeals for the District of Columbia, praying that a judgment be entered reversing the decision of the Secretary in Order 18 and holding unlawful and setting aside the order.

The Porto Rican American Sugar Refinery, Inc., intervened for the purpose of sustaining the action of the Secretary in issuing Order 18 (R. 183-87).

The American Sugar Refining Company, Godchaux Sugars, Inc., Henderson Sugar Refinery, Inc., Imperial Sugar Company, Inland Sugar Company, the National Sugar Refining Company, Refined Syrups and Sugars, Inc., Revere Sugar Refinery, Savannah Sugar Refining Corporation, and Western Sugar Refinery intervened to support the constitutionality of the Act (R. 187-93).

The Government of Puerto Rico intervened for the purpose of supporting the contention of the appellant that the Act was unconstitutional.

The Court of Appeals for the District of Columbia rendered a decision, 171 F. 2d 1016 (R. 194-97), on November 24, 1948, holding that the Secretary did not comply with the Act, and reversed and remanded the case to the Secretary. The constitutionality of the Act was not decided.

The court's decision can be divided conveniently into three parts, one for each factor considered by the Secretary.

First, in Order 18 the Secretary found that marketing conditions during the war years were so abnormal that he gave each refiner credit for its highest single year's marketings in the continental United States during the period 1935 through 1947. This gave each refiner the benefit of maximum ability achieved under either normal prewar conditions or abnormal wartime conditions (R. 170-71, 173). The lower court held this measure failed to give effect to "ability to market," and stated:

> "... Performance in the 12 years before 1947 has nothing to do with ability to market in 1948 .... Actual performance may be, as the order says, a better measure of ability to market than plant capacity. But since the ability to be measured is current ability, if performance is to be the measure it must be current performance." (R. 196.)

Second, in consideration of the war years' abnormality, the Secretary in Order 18 measured "past marketings" by each refiner's average performance during its best five years of the period 1935 through 1941 (R. 169-70, 172). The lower court held that in excluding the six years 1942-1947 the order failed to comply with the Act, and stated:

> "... 'Past marketings,' as that term is used in the Act, plainly includes marketings within the last half-dozen years or at least the more recent of them. It is doubtful whether the term includes anything else." (R. 196.)

Third, the Secretary in Order 18 considered the factor of "proportionate shares" but concluded that it was inapplicable and therefore gave it a weighting of zero (R. 168-69, 171). The lower court, after citing the Secretary's reasons for his conclusion, held:

> "... No doubt facts of this sort may be considered in determining how much weight should be given to processings of proportionate-shares sugar. In our opinion they cannot justify refusal to give the standard any weight at all." (R. 197.)

Within the statutory time limit both the Secretary of Agriculture and petitioner filed petitions for certiorari. A third petition, based solely on the constitutional issue, was filed by the Government of Puerto Rico. Orders allowing certiorari for all three were filed by this Court on April 25, 1949 (R. 208).

SPECIFICATIONS OF ERROR.

1. The court erred in holding that the Secretary of Agriculture, in issuing Order 18, failed to give effect to "ability to market."

2. The court erred in holding that the Secretary of Agriculture, in issuing Order 18, failed to give effect to "past marketings."

3. The court erred in holding that the Secretary of Agriculture, in issuing Order 18, could not give a weighting of zero to "proportionate shares."

4. The court erred in reversing and remanding Order 18.

SUMMARY OF ARGUMENT.

Section 205(a) of the Sugar Act of 1948 authorizes the Secretary of Agriculture, in order to prevent disorderly marketing or to afford all interested persons an equitable opportunity to market sugar, to allot the direct-consumption portion of the Puerto Rican sugar quota among the refiners of sugar in that area. In making such an allotment, the Secretary is directed to reach a "fair, efficient and equitable distribution" by considering three guides: "ability to market," "past marketings," and "proportionate shares." Clearly the Secretary's actions are controlled by the "fair, efficient and equitable" standard. The intent of Congress was to vest in the Secretary as administrator of the Act the discretion to determine a distribution which is fair, efficient, and equitable by considering the three guides, which are not specifically defined in the Act. There is no requirement that the Secretary reach this result through the use of a mathematical formula.

Nevertheless, in allotting the 1948 direct-consumption sugar quota for Puerto Rico, the Secretary issued his order only after a full hearing on the matter by considering "ability to market" and "past marketings" and weighting each fifty percent. "Proportionate shares" was also considered, but weighted zero because the Secretary determined it to be inapplicable. The Court of Appeals for the District of Columbia reversed the order on the ground that the Secretary had misinterpreted the statutory language and had therefore exceeded his authority. The court did not challenge the fairness of the Secretary's order. It assumed, without referring to the record on which the order was based, that the guides must be given rigid defini-

tions as a matter of law, regardless of whether the result reached is equitable or inequitable.

Petitioner contends that under the Sugar Act the Secretary has the discretion to determine the scope of the statutory guides, provided that his determinations are reasonable in the light of existing circumstances. The reasonableness of his decisions is the sole issue in this case. The Secretary's approach was doubtless not the only reasonable approach which was available to him. The suggestions of the lower court, for example, may not have been unreasonable. But if, with all relevant facts taken into consideration, the Secretary applied the statute reasonably, his order was valid.

The Secretary used as a measure of "ability to market" the highest single year's marketings in the continental United States by each refiner during the period 1935 through 1947. Normally, only the most recent years would have been used. During the war, however, as the hearing record reveals, the Puerto Rican sugar economy was violently disrupted by supply, transportation, shipping, and storage problems and by government restrictions. Puerto Rican refiners were unequally affected by these dislocations, and the use of the war years alone would have been unfair and unrealistic in the case of some refiners, particularly petitioner. For this reason the Secretary concluded that it was reasonable to extend the measuring period to the normal prewar years; but in order to insure fairness to all, he gave full credit for their highest year's marketings to those refiners which reached their peak during the war. Furthermore, in order to establish that the measure of "ability to market" was in fact a reasonable measure of current ability, the present plant capacity of each refiner was used as a check. In each case the tonnage of sugar which could currently be processed substantially exceeded marketings during the year chosen as a measure. In the light of surrounding circumstances the measure used was clearly reasonable.

To measure "past marketings" the Secretary gave each refiner credit for the average of its highest five years' marketings in the continental United States during the period 1935 through 1941. Here again the disruptions of the war were a primary consideration. The Secretary concluded that a proper and orderly historical picture of each refiner's marketings could reasonably be drawn from the orderly prewar years rather than from the chaotic war years, and he therefore excluded the latter. His original proposal called for an average of marketings by each refiner during the seven prewar years. The hearing revealed that this might be unfair to newcomers to the field who did not market during the early years of that period, so, in the interests of equity, the Secretary modified his measurement, using instead each refiner's average marketings during its best five years from 1935 through 1941. His measurement of "past marketings" was thus eminently fair and reasonable.

The Secretary also considered "proportionate shares," a term derived from another title of the Sugar Act relating to a wholly different situation. "Proportionate shares" was weighted zero because the Secretary determined that this guide could not appropriately be applied. At the hearing which preceded the order not one witness suggested a method by which "proportionate shares" could be applied, nor was there any complaint that a weighting of zero for this factor would result in unfairness or hardship to any refiner. The lower court, in holding that the Secretary must give the factor some weighting greater than zero, drew a distinction between the zero weighting and all other weightings, which is highly unrealistic. It is submitted that if the Secretary has the discretion to determine according to surrounding circumstances the weighting to be given a standard, this discretion extends to the use of a zero weighting. The Secretary's determination was fair and reasonable.

Since each decision made by the Secretary was fully supported by the evidence adduced at the hearing, and since

the interpretation which he gave to each of the three standards and the manner in which he applied them were in no sense arbitrary or capricious, his determination should not have been reversed. The interpretations advanced by the lower court provide evidence that other approaches to the problem—if they had sufficient factual support—might be as reasonable as that taken by the Secretary. But the question to be decided in this case is whether the Secretary's decisions were reasonable within the scope of his statutory authority. Such a question cannot be decided in a vacuum with the aid only of the language of the Sugar Act. It must be decided with reference to the facts which the Secretary considered and which formed the basis of his conclusions.

ARGUMENT.

A. The Primary Standard Which the Secretary of Agriculture Must Follow in Allotting a Quota is That It be "Fair, Efficient, and Equitable."

The Sugar Act of 1948 requires that if the Secretary of Agriculture finds it necessary, he shall make allotments of any quota among the marketers and importers of sugar under that quota. This determination clearly requires the exercise of considerable judgment and discretion on the part of a skilled administrator, including the careful appraisal of all surrounding circumstances which may be relevant to the purposes of the Act. When a statute authorizes an allotment involving varied and conflicting interests, it is sound legislative policy to entrust the task of administration to an expert agency and to grant that agency broad discretion. Cf. *Railroad Commission of Texas* v. *Rowan & Nichols Oil Company*, 310 U. S. 573, 580-81 (1940).

Accordingly, Congress used broad language in conferring power under Section 205(a) of the Sugar Act. The Secretary is authorized to set the allotment "in such

amounts as to provide a fair, efficient, and equitable distribution of such quota or proration thereof." The use of the words "fair, efficient, and equitable" evidences the scope of the discretion conferred upon the administrator. In *Securities & Exchange Commission* v. *Chenery Corporation*, 332 U. S. 194 (1947), this Court considered similar language in the Public Utility Holding Company Act of 1935,[2] and concluded:

> " . . . The 'fair and equitable' rule of § 11(e) and the standard of what is 'detrimental to the public interest or the interest of investors or consumers' under § 7(d)(6) and § 7(e) were inserted by the framers of the Act in order that the Commission might have broad powers to protect the various interests at stake. 318 U. S. at 90-91. The application of those criteria, whether in the form of a particular order or a general regulation, necessarily requires the use of informed discretion by the Commission. The very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters. See *United States* v. *Lowden*, 308 U. S. 225; *I. C. C.* v. *Railway Labor Assn.*, 315 U. S. 373." (332 U. S. at 208.)

That Congress was aware of the significance of the language which it used seems clear from a statement contained in a report by the House Committee on Agriculture[3] when the Sugar Act of 1948 was being considered by Congress. While the statement refers specifically to Section 302(b) of the Sugar Act, which deals with the establishment of "proportionate shares," it indicates that Congress recognized that broad discretion on the part of the Secretary and "fair and equitable" determinations go hand in hand:

> " . . . It is the judgment of the committee that *considerable discretion should be left to the Secretary* to deal with the varied and changing conditions in the various producing areas, *in order to establish fair and*

[2] 49 Stat. 803, 15 U. S. C. § 79 *et seq*

[3] H. Rep. No. 796, 80th Cong., 1st Sess., p. 8.

> *equitable* proportionate shares for farms in such areas." (Emphasis supplied.)

During hearings Mr. Pace, Chairman of the Committee, discussed that section[4] in the following language:

> ". . . Of course, most quota laws do set up certain definite standards to guide the Secretary but it seems here that while those things are elements that he should consider, *it is largely a matter of discretion.*" (Emphasis supplied.)

It must be borne in mind that the "fair, efficient, and equitable" standard is that which primarily controls the Secretary's actions under Section 205(a). The application of a rigid formula which took no account of inequities would thwart the Congressional intent. If the decision of the lower court is upheld, the wide discretion which Congress sought to confer will give way to unduly narrow, judicially imposed restrictions.

In order to assist the Secretary in reaching a fair, efficient, and equitable determination, Congress set forth three subordinate standards: "past marketings," "ability to market," and "proportionate shares." It authorized the Secretary to reach a "fair, efficient, and equitable" result "by taking into consideration" these three factors. Congress did not require that they be applied as a rigid formula. It merely required that they be considered. There is no statutory requirement that the Secretary give a definite weighting to each. He could consider carefully each of the three factors. Then, with these factors in mind, but without the use of an actual formula, he could reach a fair, efficient, and equitable determination. Such procedure would seem to be in accord with the language of the Act and with the intent of Congress. Certainly the Secretary would have reached his decision "by taking into consideration" the factors. As this Court said of minimum milk

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[4] Hearings before the House Committee on Agriculture, 80th Cong., 1st Sess., p. 23.

prices which the Secretary of Agriculture is authorized to fix under Section 8c(18) of the Agricultural Marketing Agreement Act,[5] such administrative decision "cannot be determined by mathematical formula, but the standards give ample indication of the various factors to be considered by the Secretary." *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 577 (1939). This language applies equally to the Secretary's determinations under Section 205(a) of the Sugar Act.

A somewhat similar situation was considered in *Opp Cotton Mills, Inc.* v. *Administrator of the Wage and Hour Division of the Department of Labor*, 312 U. S. 126 (1941). Section 5 of the Fair Labor Standards Act of 1938[6] required that the Wage and Hour Administrator appoint certain industry committees, and that in so doing "the Administrator shall give due regard to the geographical regions in which the industry is carried on." To the contention that this language required the application of a mathematical formula, this Court replied:

> " . . . But the requirement of the statute that the Administrator give 'due regard' to geographical considerations is not a requirement for a mathematical geographical apportionment of the committee. It calls for the exercise of discretion by the Administrator in selecting, *with the purposes of the Act in mind*, a committee on which the geographically distributed interests of the Industry shall be fairly represented." (312 U. S. at 150-51. Emphasis supplied.)

Nevertheless, in administering Section 205(a) of the Sugar Act of 1948 the Secretary has made it a practice to determine on the basis of evidence taken at open hearings, first, a reasonable measure of each factor, and second, a specific weighting for each such factor. Following this procedure it is essential that the Secretary have the power to decide, within reasonable limits, the method of measur-

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[5] 50 STAT. 246, 7 U. S. C. § 601 *et seq.*

[6] 52 STAT. 1060, 29 U. S. C. § 201 *et seq.*

ing each factor and the weighting which it should be given, so that the net result will meet the primary statutory requirement of being fair, efficient, and equitable. If he were limited to one definite measure or to one exact weighting for each factor, his discretion would be greatly restricted and the requirement of fairness and efficiency would become meaningless. The Secretary would have only the power to find the facts and apply the formula; the result, fair or unfair, efficient or inefficient, equitable or inequitable, would be the allotment at which he must arrive.

Yet the decision of the Court of Appeals would tend toward this result. Not only did the court hold that the Secretary had failed to take into account any of the three factors as required by the statute, but it offered its own definition of two of the factors. It did not qualify its definitions; it made no allowances for unusual circumstances which might render them unfair or unrealistic. Indeed, it even implied that the Secretary erred by taking certain equities into consideration (see *infra* at page 22). Certainly there is no warrant for the contention that each factor is, as a matter of law, susceptible of only one definition. Had Congress so believed, it would have written such definitions into the Act.

If the decision of the lower court is not reversed, the Secretary's discretion will be circumscribed by limitations which Congress did not see fit to impose, and the standard of "fair, efficient, and equitable distribution" will be virtually stricken from the Act.

B. The Secretary Was Reasonable in Determining "Ability To Market" as He Did.

Section 205(a) of the Sugar Act of 1948 requires the Secretary to reach a "fair, efficient, and equitable" allotment by taking into consideration, among other factors, "ability . . . to market or import . . . " In issuing Order 18 on the basis of a hearing record replete with testimony to support the decision, the Secretary used as a measure

of "ability . . . to market" the best single year's performance by each refiner during the period 1935 through 1947 (R. 173). The Court of Appeals, without referring to the facts in the record, held that "though the order purports to give effect to 'ability to market' we think it fails to do so" (R. 196).

Whenever an administrator is vested, under statute, with the power to make determinations involving the exercise of his discretion, the underlying theory is that, faced with many choices, he is free to select any which is reasonable. Ideally, of course, the administrator, guided by his experience and expert knowledge, should make the best possible choice. But what constitutes the best possible choice is usually, in actual practice, a matter of opinion, incapable of exact determination. It is therefore basic that the administrator's choice will not be set aside if, taking into consideration all the facts before him, it is reasonable. The fact that other persons, even judges, might find another choice as satisfactory, should not invalidate the administrative determination, provided that there is evidence to support it. See *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303-04 (1937); *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286-87 (1934); *Manufacturers Railway Co.* v. *United States*, 246 U. S. 457, 481 (1918); *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361 (1915).

Administrative finality is not applicable only to agency findings of "fact" in the narrow, literal sense; see *Securities & Exchange Commission* v. *Central-Illinois Securities Corp.*, 69 Sup. Ct. 1377, 1393 (1949). For example, in *Gray* v. *Powell*, 314 U. S. 402 (1941), this Court sustained an administrative determination that a particular railroad company was not a "producer" of coal under Section 4 of the Bituminous Coal Act of 1937.[7] In *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944), the Board's decision that newsboys were "em-

[7] 50 Stat. 72, 15 U. S. C. § 828 *et seq.*

ployees" as used in Section 2(3) of the Wagner Act[8] was upheld, this Court stating:[9]

> " . . . But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the Commissioner's determination under the Longshoremen's and Harbor Workers' Act,[10] that a man is not a 'member of a crew' (*South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251) or that he was injured 'in the course of employment' (*Parker* v. *Motor Boat Sales*, 314 U. S. 244) and the Federal Communication Commission's determination[11] that one company is under the 'control' of another (*Rochester Telephone Corp.* v. *United States*, 307 U. S. 125), the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." (322 U. S. at 131.)

This language was paraphrased by the Court in *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U. S. 143, 151 (1946), which upheld an administrative rejection of a claim under the Alaskan Unemployment Compensation Law[12] on the ground that the unemployment was "due to a labor dispute which is in active progress." The Court added:

> " . . . To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had this question arisen in the first instance in judicial proceedings." (329 U. S. at 153.)

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[8] 49 STAT. 450, 29 U. S. C. § 152 *et seq.*

[9] The Court's footnotes have been retained but renumbered.

[10] 44 STAT. 1424, 33 U. S. C. § 901 *et seq.*

[11] Under § 2(b) of the Communications Act of 1934, 48 STAT. 1064, 1065, 47 U. S. C. § 152(b).

[12] EXTRAORDINARY SESSION LAWS OF ALASKA, 1937, Ch. 4, as amended by Chs. 1 and 51, SESSION LAWS OF ALASKA, 1939.

See also *Cardillo* v. *Liberty Mutual Insurance Company*, 330 U. S. 469 (1947).

This elementary principle is important in view of the approach taken by the lower court. That court held that the Secretary failed to interpret correctly the language of the Sugar Act of 1948; and it then further stated that, under the Act, the Secretary must necessarily adopt certain alternatives (R. 196). Thus the court, without reference to the facts in the record, held that the Secretary failed to give effect to "ability to market" as set forth in the Sugar Act. This holding was reached through the argument that in administering the Sugar Act "ability to market" can be determined only by one of two measurements. The court accepted, *arguendo*, the contention that "actual [past] performance may be . . . a better measure of ability than plant capacity," but it added that if the former is utilized it must consist merely of performance during the single year preceding the allocation. However, the court's argument did not change the issue before both that court and this one. Whether the measures suggested by the court were reasonable, or whether they were as wise as the measure used by the Secretary, is not in question. The sole issue is still whether the Secretary's choice was reasonable. And a determination of that issue must rest upon the facts which the Secretary had before him in making his decision, and which the Court of Appeals ignored.

Merely for the sake of argument it can be assumed that the measure should relate to "current" ability, since it is used in making current allocations. Current ability, as the lower court pointed out, can be determined either by present plant capacity or on the basis of past performance. The former measure was rejected by the Secretary as less satisfactory than the latter (R. 5, 27, 170). This rejection was certainly not arbitrary, since plant capacity measures potential ability to produce provided that a number of other factors are present, and since ability to produce is related only indirectly to ability to market in the con-

tinental United States. This measure is not so ideal that it was unreasonable for the Secretary to reject it. At the hearing spokesmen for Central Roig and Western accepted this rejection (R. 47-48, 120), and the lower court virtually conceded that the Secretary's action in this respect was not erroneous.

The Secretary therefore decided to reach a fair, efficient, and equitable allotment by estimating current ability to market on the basis of past performance. Past performance may be useful as such a measure because it provides a reasonable basis for predicting ability in the current year. If current ability is to be measured, the past performance must, of course, have some relevance to current conditions, and in the selection of a measuring period or periods many factors come into play which have a bearing upon that relevance. In wholly normal periods the most important of these factors would undoubtedly be proximity in time: that is, a period closely preceding the current period would recommend itself as the most reasonable measure, since it would bear the closest possible relation to the current period. Under such circumstances it might even be unreasonable to reject such a recent period in favor of a period more distant in time. The lower court, in holding the Secretary in error for his choice of a measure of "ability to market," assumed, in fact, that the time relationship so far outweighed all other factors that only the immediately preceding year could be used as a measure.

This assumption, however, is justified only when the period being used as a measure is wholly normal and can therefore provide a satisfactory measure to begin with. Under any circumstances other than normal—in which case the past period chosen is not an exact measure of the present—the significance of the proximity in time is reduced, and other factors may loom far more important. When external events and circumstances render the period under consideration abnormal, the period has from the beginning little value as a measure, and its value cannot possibly be

enhanced by its closeness in time. This is mere common sense. Thus if the ability of a particular refiner to market were demonstrated by consistent performances over a period of years, a sudden, temporary interruption of that performance during a given year or years by freak weather, disease, unforeseen shipping difficulties, the disruptions occasioned by war, or some other obstacle would not indicate that the refiner's ability to market had actually changed. In all probability, its ability during a subsequent year would resume the pattern of the normal, rather than the abnormal, period. Yet the lower court made no qualification whatever to indicate its recognition of this situation. It failed to realize that the Secretary must deal, not with absolutes, but with factors which differ in relative importance from year to year, according to the existing circumstances. It failed to realize that the circumstances experienced by Puerto Rican refiners during the war years were extremely abnormal, and that performance during those years, particularly in the case of petitioner, bore no necessary relationship to ability to market in 1948. Those circumstances were set forth in detail at the hearing which preceded Order 18 and served as a basis of Order 18.

"Ability to market" includes the ability to make, ship, and sell one's product in the continental United States. The record upon which the Secretary based his decision revealed two salient facts: first, that during the recent war years production, shipping, and marketing of Puerto Rican sugar were seriously disrupted; and second, that these disruptions affected various sugar producers unequally.

The wartime dislocations were set forth clearly at the hearing and were considered by the Secretary (R. 28-29, 164-66). On August 14, 1941, price control over sugar became effective (R. 110). On April 13, 1942, the President proclaimed an emergency with respect to sugar. Title II of the Sugar Act of 1937[13] was suspended, and no individ-

[13] 50 STAT. 903.

ual marketing allotments of direct-consumption sugar were made under this Title until the suspension was lifted on November 28, 1947 (R. 9, 29, 109). During the war years there were problems brought about by Navy controls and submarine warfare (R. 14, 68). Caribbean shipping had to be convoyed, and shipping space was limited (R. 70-72). Imports and exports of sugar into and from the United States were controlled by the Government (R. 109). From 1944 through 1946 the Commodity Credit Corporation purchased all available Puerto Rican raw sugar in excess of local needs. The corporation then determined the quantity which could be refined for marketing in the United States, and released this quantity to the raw mills for sale to refiners (R. 32-34, 67). Since the decisions of Commodity Credit Corporation as to the disposition of this sugar were prompted by considerations of wartime requirements (R. 14), the normal channels of supply for refiners were disrupted. In 1947 a different procedure was followed, with Commodity Credit Corporation utilizing a purchase contract to allot marketing quotas directly to the refiners (R. 12-13) on the basis of each refiner's 1946 marketings in the United States (R. 119). Unlike allotments under the Sugar Act of 1937 or the Sugar Act of 1948, the 1947 contract was not subject to the requirement that the results be "fair, efficient, and equitable" (R. 14).

That the wartime dislocations affected different refiners in varying degrees is amply demonstrated by the record of the hearing (R. 23-24, 170). Thus some refiners experienced no difficulties (R. 50-52, 59, 61). In fact, some were benefited by the war years (R. 45). Others, particularly petitioner, were faced with serious problems. Petitioner had had a long and consistent record of marketing in the continental United States (R. 36). Indeed, it had introduced the sugar refining industry into Puerto Rico; the quota for direct-consumption sugar from Puerto Rico which is contained in the present Sugar Act is based almost entirely upon petitioner's marketings (R. 69-70, 155). However, because of its location and operational methods, peti-

tioner was faced with substantial difficulties during the war years (R. 74-75, 78-80, 97). Unlike some of its competitors, petitioner depends for part of its raw sugar supply upon nonaffiliated mills (R. 37, 85-88), and with gasoline and tires rationed and truck transportation strictly regulated, it was often unable to secure transportation from such mills (R. 63, 73). Furthermore, petitioner is located so far from the principal wartime seaport that it was impracticable to transport its sugar there (R. 68, 74). The movement of the sugar to a smaller but closer port was also fraught with problems (R. 65). Wartime black-outs caused difficulties (R. 64-65). There was a shortage of bags (R. 64). At least one shipment of petitioner's sugar was presumably lost at sea (R. 81). Forced by the lack of shipping facilities to store its sugar in Puerto Rico, petitioner was unable, despite all its efforts, to obtain the necessary storage space, with the result that its production was slowed down and at times even halted (R. 66-67, 77, 104-05).

In 1947, when the refiners began to emerge from the effects of the war (R. 68), petitioner contracted to buy approximately 85,000 tons of raw sugar for refining and shipping to the United States. It was prevented from doing so by Commodity Credit Corporation, which limited its shipments to 60,820 tons (R. 69). The record is devoid of any indication that similar cut-backs were forced on other refiners.

In short, it is clear that the use of such years, however recent they might be, was by no means the only reasonable method of determining the current ability of all Puerto Rican refiners to market. In the case of petitioner the distortions of the normal pattern were so great that those years would not and could not lead to "fair, efficient, and equitable" results.[14]

[14] At the hearing the President of Western Sugar Refining Company testified that marketings for 1947 alone should be used as the measure of every refiner's ability. His basis for this proposal was that in allotting the direct-consumption sugar for the year 1939 the Secretary had given some weight to 1938 marketings. Counsel

With all the above facts before him, the Secretary made his finding in these words:

> ". . . Under normal circumstances the selection of a recent year to measure ability would seem reasonable. The past six years, however, have been abnormal years for the sugar industry in Puerto Rico and elsewhere. Therefore, the selection of a recent year to measure ability for all Puerto Rican refiners would not be fair to some, and would not properly measure their ability." (R. 170.)

Nevertheless, the Secretary did not reject the war years entirely, since he decided that it would be "fair to select a recent year from any refiner who despite wartime difficulties, has been able to demonstrate greater ability than was demonstrated during pre-war years" (R. 170). For two of the refiners this peak year was 1947. It is difficult to find cogent arguments with which to challenge the reasonableness and fairness of the procedure followed. Indeed, the lower court did not deny that the measure used by the Secretary was chosen in an effort to reach a fair and equitable result. However, the court was critical:

> "The Secretary's argument undertakes to equate each refiner's ability to market with the right to market that the Secretary thinks the refiner ought, as a matter of fairness, to have." (R. 196.)

In a sense, this language distorts the Secretary's purpose since it implies that he considered not "ability to market" but an artificial measure which he invented. In fact, as the record discloses, the Secretary sought only to use a reasonable measure which would contribute to a "fair, efficient, and equitable" result, in accordance with the mandate of the Sugar Act.

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for petitioner pointed out that 1947 was Western's best year but an extremely poor one for intervenor, and asked whether "it would be fair to take your best year and take your competitor's worst year?" The witness replied, "Not at all, no. If there were not (sic) ruling and no precedent that the previous year be taken, of course not" (R. 124).

The lower court's chief objection to the measure used by the Secretary would seem to be that the measuring year for certain refiners, particularly petitioner, was separated from 1948 by a number of years. However, distance in time is not in itself an evil; it is objectionable only when events during the intervening years have been such that the measuring year no longer bears any reasonable relation to the year for which the allotment is set. Such a measure might be unreasonable, for example, if the intervening years had seen a steady decline in the marketing ability of a particular refiner. The court flatly ignored the fact that the procedure employed by the Secretary in issuing Order 18 effectively obviated this objection. While the Secretary rejected plant capacity as the primary measurement of "ability to market," he nevertheless checked the current capacity of each refiner in order to insure that its ability in the year chosen as a measure bore a fair relationship to its present ability (R. 16-17, 149). This check disclosed that in each case present capacity substantially exceeded marketings during the measuring year (R. 147, 149, 164). It revealed also that despite the fluctuations of marketings during the war years, current capacity did not differ significantly from capacity in the prewar year of 1939 (R. 27-29). In the case of petitioner, Juan E. Mayoral, engineer and general superintendent of manufacturing operations, testified that its actual plant capacity exceeded that shown by the figure for 1947, a year in which restrictions forced a production slow-down (R. 105). He stated that the refining capacity of petitioner had increased "conservatively at least 10 per cent over the 1939 capacity" (R. 103). Mr. Gustavo Lobo, Jr., President of Olivarria & Company, Inc., of New York, which markets petitioner's sugar in the United States, testified that "During the past five years, I could have marketed any amount that they shipped up, and I would say next year 150 to 200 thousand tons would present no difficulty" (R. 62). On the basis of this evidence it was not arbitrary for the Secretary to find that the measure used for each refiner bore a reasonable relationship to ability in 1948.

In other words, the Secretary's measure was chosen because, with evidence of present plant capacity as a check, it was concluded that ability to market once established by actual performance would normally continue despite the fact that, for a period of years, external obstacles or restraints prevented full utilization of that ability. On the other hand, to argue that a temporary and unavoidable failure to utilize one's ability must inevitably result in diminished ability so as to render invalid as a measure the earlier normal period, seems unreasonable and unrealistic in the extreme. One might with similar logic argue that because the atom bomb was not used in warfare in 1946, 1947, or 1948, its earlier performance in 1945 has ceased to have any relationship to its potentialities in 1949.

As has been shown, the Secretary's measure did not discriminate arbitrarily or unfairly in favor of Porto Rican American as against recent arrivals in the field. Nor did the lower court maintain that there was any such discrimination. Since the best single year's performance by each refiner was recognized, each refiner whose marketings reached a peak during a war year—even though this may have been made possible by temporary abnormal conditions—received the full benefit of that figure.

Thus the Secretary's measure was eminently fair and reasonable. No baseless assumptions were involved and no outrageous results achieved. The suggestions of the lower court, had they been supported by any factual foundation, might have been as wise as the measure used by the Secretary, but his measure was clearly not arbitrary or capricious.

C. The Secretary Was Reasonable in Determining "Past Marketings" as He Did.

The Sugar Act of 1948 requires the Secretary to reach a "fair, efficient, and equitable" result by taking into consideration also "past marketings." Acting on the basis of the hearing, the record of which provided ample support

for his decision, the Secretary issued Order 18, in which he measured this factor by the average of the highest five years' marketings in the continental United States by each refiner during the period from 1935 through 1941. The Court of Appeals held that "In excluding the six years 1942-47 the order fails to comply with the Act" (R. 196). In reaching this conclusion the court stated that "past marketings" includes marketings within the last half-dozen years or at least the more recent of them, and that it is "doubtful" whether it includes anything else. As was true of its statement regarding "ability to market," the court made no qualification; its decision would seriously impair the Secretary's discretion.

Again, the sole issue presented is the reasonableness of the measure used by the Secretary. Whether or not it represented the wisest possible choice which he could have made is not at issue here. If he acted on grounds which made his choice reasonable, he did not commit an error of law, and his decision should not have been reversed.

Certainly the Secretary considered and applied "past marketings" as a measure, but the lower court assumed that the phrase as used in the Sugar Act has a special meaning. Yet it is not defined in the Sugar Act in the language employed by the lower court or in any other language. Unlike the lower court, Congress was willing to permit the Secretary to determine the scope of the term; had it desired to limit the Secretary's consideration to certain years, it would have done so specifically.

The language of the court implies that *Gay Union Corporation* v. *Wallace*, 71 App. D. C. 382, 112 F. 2d 192 (1940), *cert. denied*, 310 U. S. 647 (1940), was regarded as at least indirect authority for the court's position on this point. In the *Gay Union* case, the manner in which the Secretary measured "past marketings" under the Sugar Act of 1937 was attacked. But the court there held that a measurement which took into consideration only the preceding four years was not an abuse of discretion. It made no attempt to lay

down a rigid definition of "past marketings." On the contrary, it reaffirmed that the Secretary has broad discretion in determining the meaning of the term in question, and that his decision will stand unless the period chosen bears no reasonable relation to the current situation. In holding the Secretary's determination to be reasonable, the court did not suggest—as the lower court in the present case implied—that all other measures would have been unreasonable.

The sole question, therefore, is whether exclusion by the Secretary of the years 1942-1947, and the use instead of average marketings in the continental United States for the best five years for each refiner during 1935-1941, was so arbitrary as to be unreasonable. The Sugar Act does not specify how recent or how remote the "past marketings" should be. But under completely normal conditions the more recent past marketings would seem, as a matter of common sense rather than statutory interpretation, to have greater relevance to a current quota allocation than would earlier performance. And if such recent performance were without reason ignored and consideration given instead to a period so remote in time that it bore no relation to the present, the procedure might be categorized as arbitrary or capricious.

As in the case of "ability to market," the desirability of recent years as a standard exists only if those years provide an accurate measure to begin with. Only in such a case can the closeness in time of the measuring period have any significance. If, however, external conditions were to arise so that recent marketing reflected little more than fortuity or the results of emergency government controls, such years would distort marketing records, and it would not be unreasonable to exclude them.

Such abnormal conditions certainly existed from 1942 through 1947. The record abounds with testimony concerning the disruptions caused by the war, the emergency controls, the supply, transportation, shipping and storing dif-

ficulties, and the unequal impact of these abnormalities upon the various Puerto Rican refiners. All these have been discussed *supra* at pages 19f. Their net effect, as the record clearly discloses, was to create disorderly and even chaotic marketing conditions to such an extent as to render those years a completely unreliable yardstick.

It was therefore reasonable for the Secretary to consider and then to exclude the years 1942-1947 from his final measure of past marketings. The Secretary justified his act as follows:

> "In determining past marketings, it is necessary to select a representative period which is fair and equitable to all refiners in Puerto Rico. The years selected should properly reflect the normal history of the individual company. Ordinarily the most recent period of marketings recommends itself as reasonable. The past six years, however, represent a period of great abnormality for the sugar industry. . . . It is apparent from the record that the past six years are not representative years for past marketings and should not be used." (R. 169-70.)

At this point it is well to recall that allotments are authorized under the Sugar Act to "prevent disorderly marketing" and to "afford all interested persons an equitable opportunity to market sugar" in the continental United States. Surely it was not arbitrary for the Secretary to conclude that the cause of orderly marketing would be disserved by quotas based upon years when tremendous disorder admittedly existed in the marketing of sugar.

Furthermore, as testimony at the hearing revealed (see *supra* at pages 20f), the dislocations of the war were unequal in their impacts upon Puerto Rican refiners. Marketings were not only disorderly but grossly unfair as a measure to certain refiners, particularly petitioner. Remembering again that the Sugar Act authorizes quota allocations "to afford all interested persons an equitable opportunity . . ." and that the final result must be "fair, efficient, and equita-

ble," the Secretary did not act unreasonably in excluding the war years.

In Order 18 the Secretary pointed out that whereas in computing "ability to market" he gave certain refiners credit for peak performances achieved during the war, his final formula for "past marketings" excluded those years entirely (R. 170-71). This was not arbitrary. A maximum marketing figure reached by a refiner during the war years might fairly represent continuing "ability to market." "Past marketings," on the other hand, should be so selected as to give each refiner fair credit for its normal historical record over the years, and the use of the highly abnormal wartime years would provide an extremely distorted basis for such a record. There is no capricious inconsistency between the two measures; the distinction is clear and reasonable. In the words of the Secretary, "Ability to market should be recognized under whatever conditions demonstrated, although the year selected may not for other purposes be regarded as normal or representative" (R. 171). The war years were considered unrepresentative as a measure of "past marketings."

The Secretary's choice of the period 1935 through 1941 rather than the war years was not unfair or unreasonable. Those years were not so remote that they bore no relationship to the terms as used in the Act; in fact, they were the closest possible years, once the Secretary had rejected the period which he thought unrepresentative. Furthermore, in Order 18 the Secretary used as a measure for each refiner the average of the best five years during the chosen period rather than the straight average of all seven years, as originally proposed (R. 5). This change was made (R. 171) as a result of the hearing, which included testimony that in 1935 one refiner was not in existence and that during certain years another refiner marketed only turbinado sugar in small amounts (R. 45). The Secretary's action in changing the formula is further evidence of his desire to achieve results which would be reasonable and fair to all refiners.

It cannot be emphasized too frequently that the Secretary's choice was not necessarily the only reasonable one. If the record offered the necessary substantiation, other choices might have been sufficiently reasonable to comply with the statute. The issue in the instant case is the reasonableness of the Secretary's choice, not its superiority over alternative choices. His measure of "past marketings" was reasonable and should have been sustained by the lower court.

D. The Secretary Was Reasonable in Finding That "Proportionate Shares" Was Inapplicable and in Giving It a Weighting of Zero.

Section 205(a) of the Sugar Act of 1948 requires the Secretary of Agriculture to reach a "fair, efficient, and equitable" allotment by taking into consideration "processings of sugar . . . from . . . sugarcane to which proportionate shares . . . pertained." The Secretary, after fully considering this factor, found it inapplicable and therefore gave it a weighting of zero. The Court of Appeals held that as a matter of law the Secretary must accord to this factor some weighting greater than zero.

The phrase "porportionate shares" is derived from Title III of the Sugar Act, which provides for conditional payments to producers of sugar beets or sugarcane. Each farm is assigned its "proportionate share" of the quota which has been set for the producing area in which the farm is located. In order to qualify for these conditional payments the grower must not market sugar beets or sugarcane in excess of his proportionate share; he must not employ child labor outside his own immediate family; and he must not market or process "an amount . . . of . . . sugarcane grown on the farm and used for the production of sugar . . . to be marketed in, or so as to compete with or otherwise directly affect interstate or foreign commerce, in excess of the proportionate share for the farm . . ." Pay-

ment may be made to producers for the amount of sugar beets or sugarcane which is commonly recoverable from the sugar beets or sugarcane grown on the farm and marketed (or processed by the producer) not in excess of the farm's proportionate share.

Thus the use of "processings of sugar . . . from . . . sugarcane to which proportionate shares . . . pertained" as a guide to the allotment of direct-consumption sugar presents serious difficulties. The phrase seems clearly to refer to the processings of sugar from sugarcane by the respective allottees. But such processed sugar is actually "raw" sugar and must be refined before it becomes direct-consumption sugar. The three largest Puerto Rican refiners (*i.e.*, the parties to the present action) do not process raw sugar from sugarcane but instead obtain the raw sugar from independent sources or from affiliated mills. At the hearing which preceded Order 18, there was no complaint on the part of anybody that failure to utilize "proportionate shares" as a factor would result in discrimination. On the contrary, no refiner suggested a practical method of applying this standard. Mr. J. Adalberto Roig, Vice President of Central Roig Refining Company, offered a formula which made no allowance for this factor, and added only that "if the law so requires it I am willing to accept that the Secretary add to my proposed formula a small weight based on proportionate shares . . ." (R. 49). Similarly, Mr. Alfredo Ramires de Arellano, Jr., President of Western Sugar Refining Company, testified that if necessary this factor could be included, but he offered no suggestion as to how this might be accomplished (R. 123).

In view of the foregoing facts, the Secretary in Order 18 gave the factor a weighting of zero. The Court of Appeals, in holding the Secretary in error, stated that the facts on which he relied "may be considered in determining how much weight should be given to processings of proportionate-shares sugar. In our opinion they cannot justify refusal to give this standard any weight at all" (R. 197).

The court failed, however, to comment further on the facts which the Secretary had before him or to indicate the manner in which this standard could be applied.

It is well recognized that when an administrator considers several factors, the weighting which he gives to each factor lies within his discretion; see *Interstate Commerce Commission* v. *City of Jersey City*, 322 U. S. 503, 522 (1944). The Court of Appeals did not deny this proposition. However, it appeared to draw a highly unrealistic distinction between a weighting of zero and any other weighting. Presumably if the Secretary had found a means of giving the standard in question a weighting of fifty percent, the court would have been satisfied. Furthermore, its language plainly suggests that it would have upheld a weighting of ten percent, five percent, or even one or one-half percent. If the Secretary has the discretion to determine the weighting of a standard in this manner, how can it be said that he exceeds his authority by choosing a weighting of zero? If he has the authority to choose a weighting of fifty percent or of one percent according to the existing circumstances, he would seem clearly to have the authority to choose a weighting of zero percent provided that the facts make this choice reasonable. In the instant case the facts all point to the reasonableness of such a choice. In fact, the hearing record is utterly devoid of any suggestion of a reasonable means of giving greater weight to the factor.

The lower court placed great stress upon the fact that the Sugar Act requires the Secretary to reach a decision "by taking into consideration" the three factors, stated conjunctively rather than disjunctively. The court apparently interpreted this language to mean that the Secretary must reach his decision by giving each factor a weighting greater than zero. This construction is wholly unwarranted. The language of the Act does command the Secretary not to ignore any factor. But it is possible for him to take a factor into careful consideration, to hear the testi-

mony of interested parties, to take account of all surrounding circumstances, and then to conclude that the factor should be given a zero weighting in order that a fair, efficient, and equitable distribution may be achieved. Such procedure is consistent with both the spirit and the letter of the Sugar Act. On the other hand, any interpretation of the language of the Act which would prevent the reasonable action taken by the Secretary in issuing Order 18 is unduly narrow and restrictive.

As the record reveals (R. 168-69), the Secretary did take into consideration "processings of sugar . . . from . . . sugarcane to which proportionate shares . . . pertained," and his action in giving this standard a weighting of zero was reasonable.

CONCLUSION.

For the reasons stated it is respectfully submitted that the decision below should be reversed and the cause remanded with directions to enforce Order 18 of the Secretary of Agriculture.

Respectfully submitted,

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